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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1174

TIME, INC.,

Petitioner,

v.

MICHAEL S. VIRGIL,

Respondent.

PETITIONER'S REPLY

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STATEMENT

Respondent's brief in opposition is in error concerning and makes unfounded factual statements as to the basis of this action. It also ignores the basic questions before this Court as to definition of a standard of constitutional protection for truthful public disclosure of private facts and whether application of that standard is a question of law for a court or a question of fact for a jury. Thus this brief reply memorandum.

Erroneous characterization of the nature of this action (br. pp. 2-3).

The Ninth Circuit correctly stated that the basic question presented is as to "a standard for newsworthiness" for public disclosure of private facts (App. A, p. 14).*

Respondent now seeks to broaden the basis of his claimed cause of action for public disclosure of private facts and asserts in this Court abandoned and inapposite claims which the Ninth Circuit clearly noted as having been dismissed from the case (App. A, fn. 3, p. 6). He now states (br. p. 3) that he is also seeking to recover for "intrusion" and for "intentional infliction of emotional distress". Neither of these dismissed claims has any substance in this Court.

With respect to intrusion, respondent cites (br. p. 3) *Dietemann* v. *Time, Inc.*, 449 F. 2d 245 (9th Cir. 1971) and *Pearson* v. *Dodd*, 410 F. 2d 701 (D. C. Cir. 1969), *cert. denied*, 395 U. S. 947. Both those cases made crystal clear that publication, which is the only basis upon which respondent seeks to recover, has nothing whatsoever to do with "intrusion" since that tort deals solely with an actual physical invasion into a private premise. Both cases rule that there is no tort cause of action for intrusion privacy based upon publication.

With respect to intentional infliction of emotional distress, the Ninth Circuit made clear in its opinion (App. A, fn. 3, p. 6) that such a cause of action could be founded "only in cases of extreme or outrageous conduct" and that "such conduct, apart from the invasion of privacy by the publication of private facts, is not present here".

Fraud (br. p. 7).

Respondent now claims (br. p. 7) that the private facts as to respondent "were fraudulently obtained" and that "Virgil was unaware that the article's coverage of him would emphasize personal and embarrassing incidents of his adolescence".

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*The Ninth Circuit opinion is now officially reported at 527 F. 2d 1122.

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The Ninth Circuit dealt with and rejected both those claims as pointed out in our petition (p. 6). Thus, it found specifically that the private facts information "was obtained without commission of a tort and in a manner wholly unobjectionable" (App. A, p. 8) and that petitioner's reporter "did not intrude on appellee's solitude and that all interviews were freely given" (App. A, fn. 3, p. 6). There is clearly no factual basis for respondent's claim of fraud on the record here. Indeed, when the District Court questioned respondent's counsel at argument in order to ascertain the factual basis for the claim (Record —Vol. III, pp. 45-59), respondent was unable to specify any factual basis for that bald statement other than his assertion in the complaint (and respondent filed no affidavit or other proof) which was plainly contradicted by the Kirkpatrick affidavit (Record—Vol. I, p. 92):

> "In my interviews with Virgil, as in my conversations with all of the persons whom I interviewed, I made it perfectly clear that I was writing an article for Sports Illustrated and would incorporate our interviews into that article."

A standard for "newsworthiness" (br. pp. 8-15).

This entire point assumes that the facts as to respondent were not "newsworthy" but makes no attempt whatsoever to set the *constitutional standard* upon which such a finding must be based. But, that is the very question before this Court.

A question of law or fact (br. pp. 16-22).

Respondent, in his attempt to give everything to a jury, ignores the very patent fact that there must always be an initial question of First Amendment law for a court to decide prior to giving the case to a jury.* Thus, *Hill* decided "pub-

*Respondent also argues that he is not a "public figure" (br. p. 18), a posture which we have accepted throughout our petition so that this case comes to this Court on the basis that respondent is not a public figure.

lic interest" as a matter of law, *Cantrell* decided "editor's discretion" as a matter of law and *Miller* decided "commerce in ideas" as a matter of law prior to there being anything for a jury to pass upon.* True indeed, in *Miller,* there were many facets in the case for a jury but not until after the court had decided the initial question of law that the material before the court constituted "commercial exploitation of obscene material" rather than "commerce in ideas".

CONCLUSION

For the reasons stated here, and in our petition, the petition should be granted.

May 5, 1976.

Respectfully submitted,

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**Time, Inc.* v. *Hill,* 385 U. S. 374; *Cantrell* v. *Forest City Publishing Co.,* 484 F. 2d 150 (6th Cir. 1973), *rev'd and remanded,* 419 U. S. 245; *Miller* v. *California,* 413 U. S. 15.

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